United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

JANUARY TERM, 1934.

No. 6165

Special Calendar.

507

THE UNITED STATES OF AMERICA, EX RELATIONE THADDEUS R. WILKINSON AND GEORGE J. COLEMAN, APPELLANTS,

vs.

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 13, 1934.

PRINTED FEBRUARY 20, 1934.

Court of Appeals of the District of Columbia

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Court of Appeals of the District of Columbia

No. 6165.

THE UNITED STATES OF AMERICA, ex Relatione THADDEUS R. WILKINSON and GEORGE J. COLEMAN, Appellants,

vs.

FRANK T. HINES, Administrator of Veterans Affairs.

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a Supreme Court of the District of Columbia.

At Law.

No. 83269.

THE UNITED STATES OF AMERICA, ex Relatione THADDEUS R. WILKINSON and GEORGE J. COLEMAN, Petitioners,

vs.

FRANK T. HINES, Administrator of Veterans Affairs, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Writ of Mandamus.*

Filed September 29, 1933.

In the Supreme Court of the District of Columbia.

At Law.

No. 83269.

THE UNITED STATES OF AMERICA, ex Relatione THADDEUS R. WILKINSON and GEORGE J. COLEMAN, Petitioners,

v.

FRANK T. HINES, Administrator of Veterans Affairs, Respondent.

Your petitioners respectfully represent to the court as follows:

1. That they are citizens of the United States and residents of the State of Tennessee, and file this petition in their own right.

2. That respondent Frank T. Hines is a citizen of the United States and a resident of the District of Columbia, where he is Administrator of Veterans Affairs, and is sued in his own right.

3. That on or about June 5, 1916, your petitioner Thaddeus R. Wilkinson, enlisted in the military service of the United States and served therein until on or about February 5, 1919, that while in the military service of the United States petitioner, Thaddeus R. Wilkinson, entered into a contract with the United States of America for yearly renewable term insurance, under the terms of which contract the United States, in return for premiums to be deducted by it from the monthly pay of said petitioner at the rate of $4.95 each month promised and agreed to pay said petitioner the sum of $43.12 per month, should said petitioner become permanently and totally disabled while his insurance contract was in force by reason of the

2 payment of premiums, as aforesaid; and the United States further promised and agreed to pay to a beneficiary to be named by the said petitioner according to law, the sum of $43.12 each month for 240 months, in

case said petitioner should die while said contract was in force, as aforesaid, or by reason of its maturing because of the permanent and total disability of said petitioner, less any monthly payments of $43.12 each which had been paid to said petitioner; and that premiums were regularly deducted from the pay of said petitioner and said contract was in full force and effect on February 5, 1919.

4. That petitioner Wilkinson made claim to respondent for benefits under the contract of insurance aforesaid, alleging that by reason of diseases contracted in, and wounds received in the military service of the United States he had been permanently and totally disabled from the date of his discharge from the military service, but respondent denied the claim and refused to pay said petitioner said benefits; whereupon said petitioner employed your petitioner George J. Coleman, a duly qualified attorney at law, to institute suit in his behalf against the United States of America, in the District Court of the United States for the Western District of Tennessee, Western Division, to recover said benefits under the said contract of insurance; whereupon suit was instituted in said court, petitioner Wilkinson alleging in his complaint that he was suffering from nervousness or neurasthenia, and a weak and broken physique, caused by measles, September 4 to 5, 1917; appendicitis chronic, catarrhal; appendectomy, September 8, 1917; June 9-20, acute bronchitis, gassed in action—slight phosgene and yperite inhalation; August 13 to 19, 1918, abscess right foot; October 6, 1918 to February 5, 1919, gunshot wound in

3 battle, severe, penetrating right chest from which abscess developed, and hemophneuthorax on right side, said wound having been incurred under heavy artillery bombardment and machine gun fire while endeavoring to reach and render succor and aid to a wounded comrade, and it was necessary to pass through the direct fire of the German Army, and by reason of said gunshot wound on the right chest pulmonary fibrosis followed, which incapacitated him for military duty on account of dypsnœa on exertion, and that he was and had been since discharge, permanently and totally disabled; whereupon the United States filed its answer denying that petitioner Wilkinson became permanently and totally disabled while his contract of insurance was in force but not denying that he contracted the diseases and incurred the wounds aforesaid while in the military service as alleged; whereupon a

jury was impaneled and proof taken, and the defendant moved for a directed verdict in its behalf, and the plaintiff moved for a directed verdict in his behalf, whereupon the court instructed the jury to bring in a verdict for the plaintiff which was done, and judgment was duly entered for the plaintiff on December 10, 1931, ordering and directing the defendant to pay said petitioner Wilkinson the sum of $43.12 monthly from February 5, 1919, under his contract of insurance and further ordering and directing defendant to pay to said petitioner Coleman 10% of the recovery of past due installments and 10% of all future installments made by reason of the judgment, as a reasonable attorney's fee, to be deducted from the amount paid to the plaintiff; whereupon the defendant entered an appeal to the U. S. Circuit Court of Appeals, 6th Circuit, which court on June 27, 1932, dismissed said appeal; whereupon, after the mandate of the circuit court of appeals was recorded and a certified copy of the judgment was filed with respondent, an award was made by respondent to petitioners in the respective amounts due, and pay-
4 ment was made to them.

5. That from the day and date of the aforesaid award until May, 1933, monthly payments of benefits under the insurance contract aforesaid, were made in the respective amounts of $38.81 to petitioner Wilkinson, and $4.31 to petitioner Coleman, but respondent has terminated the award and has refused and still refuses to make any further payments of permanent and total disability benefits to petitioner Wilkinson under said contract or said judgment or said award, and has refused and still refuses to make any further payments to petitioner Coleman under said award and in conformity with the terms of said judgment, and refuses to recognize the validity of said yearly renewable term insurance contract or any rights of petitioners thereunder, or under said judgment, having arbitrarily determined that all rights under said contract have ceased and terminated as will more clearly appear from the following letter addressed to and received by petitioner Wilkinson:

May 9, 1933.

T. 2. 725. 270.

"Your attention is directed to the following regulation issued under the authority of Public No. 2, 73d Congress,

entitled, "An Act to maintain the credit of the United States Government."

"When an insured under yearly renewable term insurance is receiving insurance benefits on account of a total permanent disability award and such award is terminated, the insured shall be entitled to convert the amount of such yearly renewable term insurance (commuted value of the remaining unpaid installments) into any form of level premium life or endowment insurance provided by the Government. Application for such conversion, together with a remittance to cover at least one monthly premium, shall be filed with the Veterans' Administration within 31 days from the date of notice of this right. Any yearly renewable term insurance in such cases that is not converted within the prescribed time shall cease and terminate. Paragraphs R-3141 and R-3142 of Regulations & Procedure, Veterans' Administration (United States Veterans' Bureau) are hereby amended accordingly."

5 The records of this office show that the award of insurance benefits made to you on account of total permanent disability under your Yearly Renewable Term insurance has been terminated. You were paid 171 monthly installments under this insurance, and the commuted value of the remaining 69 unpaid monthly installments amounts to $2,704.00, which is the amount of insurance you are privileged to convert in accordance with the above regulation.

You may apply for the conversion of your $2,704.00 insurance or any part thereof in multiples of $500 and not less than $1,000 to any of the six following level premium life or endowment insurance plans—Ordinary Life, 20-Payment Life, 30-Payment Life, 20-Year Endowment, 30-Year Endowment, Endowment at Age 62. The converted policy applied for will be issued effective May 1, 1933 with a premium rate based on your birthday nearest the effective date of the policy. Your insurable age on that date was 39.

The enclosed booklet, form 752, entitled, "Information Regarding United States Government Life Insurance" describes the six plans of converted insurance and shows the premium rates per $1,000 of insurance. For your information there are recorded below the *monthly* premium rates at age 39 on these six plans of insurance, for the total

amount of insurance, $2,704.00 which you are privileged to convert.

Plan	Monthly premium for $2,704.00 insurance
Ordinary Life	$5.25
20-Payment Life	6.92
30-Payment Life	5.71
20-Year Endowment	9.41
30-Year Endowment	6.38
Endowment at Age 62	8.14

In order to take advantage of this privilege of conversion, you should complete page one of the enclosed Form 739, "Application for United States Government Life Insurance". A report of a physical examination is not necessary. The completed application must be accompanied by a remittance sufficient to cover the monthly premiums due, on the amount and plan of insurance selected, from the effective month of conversion, May 1933, to include the month in which the application is submitted.

To protect your insurance rights, you are urged to apply for conversion at the earliest possible date. Your attention is particularly directed to the fact that unless the completed application for conversion, with the required premium remittance, is filed with the Veterans' Administration before the expiration of thirty-one days from the date of this letter all rights to yearly renewable term insurance shall cease and terminate, and no further action with reference thereto can be taken by the Veterans' Administration.

Respectfully,

H. L. McCOY,
Director of Insurance.

6 And your petitioner Wilkinson shows to the court that it was impossible to comply with the terms of the offer in said letter and convert the commuted value of his yearly renewable term insurance in the amount stated by respondent, namely $2704, into another form of insurance as suggested and "urged" by respondent, for the reason that $2704 is no multiple of $500 as required by the terms of the offer; and petitioner Wilkinson shows the court that if he entered into a contract of insurance as proposed by respondent, and should later be found to be permanently and totally disabled while such contract was

in force, his permanent and total benefits would be limited by law to $5.75 per $1000 insurance, or a maximum total of $15.53 per month where he has been receiving and is entitled to continue to receive $43.12 monthly under his yearly renewable term insurance contract; and said petitioner shows the court that if he entered into such contract of insurance as proposed by respondent, and at some future time respondent should determine that petitioner was permanently and totally disabled as found by the court as aforesaid, when he entered into such contract, respondent could refuse to pay permanent and total benefits under the yearly renewable term policy on the ground that all rights under such policy had been terminated, and could refuse to pay permanent and total disability benefits under the converted policy on the ground that petitioner was permanently and totally disabled when said contract was entered into;

And petitioner Wilkinson is advised and believes, and so avers that respondent is not authorized by law to extend such offer, on behalf of the United States, nor to bind the United States by entering into such contract as proposed by respondent, so that such contract would be invalid and of no legal force and effect and could be

7 repudiated by respondent, his successor in office, the Comptroller General of the United States, the Attorney General of the United States, or any other government official having authority or color of authority, at any time on the ground that respondent had acted *ultra vires*, and thus petitioner and his beneficiary would be unjustly though legally, deprived of all benefits under such proposed contract; and petitioner Wilkinson is further advised and believes, and so avers, that respondent is not authorized by law to transfer the liability under the contract of yearly renewable term insurance, benefits under which contract are paid from the Military and Naval Insurance Fund, provided by the Government of the United States, to the Government Life Insurance Fund, which is derived solely from premiums paid by holders of policies of Converted Government Life Insurance, and is a trust fund belonging exclusively to said policy holders, to be returned to them in the form of benefits or dividends in accordance with the terms of their policies, of and for which said fund respondent is trustee;

And your petitioners are advised and believe, and so aver, that in terminating payments of permanent and total benefits under petitioner Wilkinson's contract of yearly renewable term insurance and in conformity with the judgment of the court, as aforesaid, and in attempting to compel said petitioner to enter into an unauthorized and illegal and void or voidable contract of insurance under penalty of the termination of all of said petitioner's rights under his said contract of yearly renewable term insurance, and the loss of all benefits thereunder to himself during his lifetime, and to his beneficiary at his death, respondent acted arbitrarily and capriciously, and without evidence to support his decision, and beyond the scope of his authority and has deprived petitioners of their property rights
8 under a valid existing contract of insurance and a judgment of a court of the United States, in contravention of the Fifth Amendment to the Constitution of the United States.

6. That your petitioners are advised that they have no adequate ordinary remedy at law.

Wherefore, your petitioners pray:

(1) That the process of this court issue to respondent Frank T. Hines, Administrator of Veterans Affairs, requiring him to appear and answer this petition.

(2) That a writ of mandamus be issued and directed to respondent Frank T. Hines, Administrator of Veterans Affairs commanding him to restore the award of permanent and total disability benefits under the contract of yearly renewable term insurance of Thaddeus R. Wilkinson, and to pay or cause to be paid to them the amounts now due them in the proportions as fixed by the judgment of the Court entered in the case of Thaddeus R. Wilkinson v. United States, and to continue to pay or cause to be paid to petitioners monthly benefits in accordance with the terms of said contract, and said judgment, and said award during the life of said Wilkinson and to pay or cause to be paid to the beneficiary of his contract of insurance any installments remaining due and payable at the death of said Wilkinson, providing that he shall have received less than 240 installments of permanent and total disability benefits, unless and until the order of this court is vacated; and for

such other further and general relief as this court may deem proper and the nature of the case may require.

THADDEUS R. WILKINSON,
Petitioner.

GEORGE J. COLEMAN,
Petitioner.

WM. WOLFF SMITH,
Attorney for Petitioners.

9 COUNTY OF ——,
State of Tennessee, ss:

We do solemnly swear that we have read the foregoing petition by us subscribed, and know the contents thereof; and that the statements of fact therein made as upon personal knowledge are true, and that those made as upon information and belief we believe to be true.

THADDEUS R. WILKINSON.
GEORGE J. COLEMAN.

Subscribed and sworn to before me this 27th day of June, 1933.

[SEAL.] ALLEN HUGHES, JR.,
Notary Public.

My commission expires April 22, 1934.

Copy.

In the District Court of the United States for the Western Division of the Western District of Tennessee.

No. 3410. In Law.

83269.

THADDEUS R. WILKINSON, Plaintiff,

VS.

UNITED STATES OF AMERICA, Defendant,

Final Judgment in Favor of Plaintiff.

Entered Dec. 10, 1931.

This cause came on to be heard this the 9th day of December, 1931 before the Honorable Harry B. Anderson, United States District Judge, and a jury of twelve lawful

citizens. After the proof had been heard which was
10 introduced both by the plaintiff and the defendant, the United States of America, the attorney for the defendant made a motion for the Court to instruct the jury to find the verdict in favor of the defendant, the attorney for the plaintiff joined in this request, whereupon the Court then took the case and decided it and was of the opinion that sufficient proof had been introduced by the plaintiff and the Court thereupon directed the jury to find the verdict in favor of the plaintiff, the judgment, therefore was for the plaintiff and it was found that the plaintiff at the time of his discharge when he was permanently and totally disabled which on February 8, 1919 had in full force and effect a Seven Thousand Five Hundred Dollars ($7,500.00) wark risk insurance policy with the Government.

It is therefore ordered, adjudged and decreed by the Court that judgment be entered against the defendant in favor of the plaintiff, Thaddeus R. Wilkinson, in the sum of $43.12½ per month from the date of his discharge from the United States Army which was on February 5, 1919 up to and including the last anniversary date next preceeding filing of suit in this cause and such further installments thereafter *o*ccruing by reason of this judgment as provided by law.

Upon the motion of George J. Coleman, attorney for plaintiff, the Court ordered that 10% of the recovery of past due installments herein decreed be paid to George J. Coleman, attorney at Memphis, Tennessee, and that said checks be sent to him at his address, 1207 Union Planters National Bank Building, Memphis, Tennessee, and the United States Veterans Bureau is directed to deduct this sum from the amount of the recovery and pay same to George J. Coleman attorney and 10% of all future installments that may hereafter be made by reason of this judgment as provided by law, and same may be also deducted by the United
11-15 States Veterans Bureau and paid directly to George J. Coleman at the same address, same being a reasonable attorney's fee for his services in the above cause. It is further understood that no costs are to be taxed against the defendant. *It is further understood that no costs are to be taxed against the defendant.*

H. B. ANDERSON,
District Judge.

Approved:
GEO. J. COLEMAN,
Attorney for Plaintiff.
Approved:
BAILEY WALSH,
Attorney for Defendant,
Asst. U. S. Attorney.
O. K.
J. G. SIMS,
Atty. Vets. Adm.

A true copy. Attest:
FINIS E. WILSON,
Clerk,
[SEAL.] By S. M. SOUTHERLAND,
D. C.

16 *Rule to Show Cause.*

Filed September 29, 1933.

* * * * * * *

Upon consideration of the petition filed in the above entitled cause, it is this 29th day of Sept. 1933 ordered that the respondent Frank T. Hines, Administrator of Veterans' Affairs, appear in this court on the 11th day of October 1933, and show cause, if any he has, why a writ of mandamus should not issue — of this court commanding him to restore the award of permanent and total benefits under the contract of yearly renewable term insurance of Thaddeus R. Wilkinson, and to pay or cause to be paid to petitioners the amounts alleged by petitioners to be due them in the proportions as fixed by the judgment of the court entered in the case of Thaddeus R. Wilkinson v. United States, and to continue to pay or cause to be paid to petitioners monthly benefits in accordance with the terms of said contract and said judgment, and said award during the life of said Wilkinson, and to pay or cause to be paid to the beneficiary of his contract of insurance any installments remaining due and payable at the death of said Wilkinson, provided that he has been paid less than 240 such installments of permanent and total benefits during his lifetime, and that said payments should continue as aforesaid, unless and until the order of this court in the premises shall be vacated.

Provided, that a copy of this rule be served upon the respondent at least two clear days before the return day hereinbefore first fixed.

F. D. LETTS, *Justice.*

17 *Marshal's Return.*

Served a copy of the above rule on the within named Frank T. Hines—Administrator of Veterans' Affairs personally 9-29-33 Edgar C. Snyder U. S. Marshal in and for the Dist. of Columbia By W. J. Roberts Deputy U. S. Marshal K

Answer to Petition and Return to Rule.

Filed October 11, 1933.

* * * * * * *

Now comes the respondent, Frank T. Hines, Administrator of Veterans' Affairs now and at all times saving and reserving unto himself all exceptions to the many imperfections, uncertainties and defects in the petition for the writ of mandamus filed herein and reserving unto himself all benefits of the lack of jurisdiction of the court appearing upon the face of said petition to grant the relief prayed, and the lack of jurisdiction of the court to direct him as Administrator of Veterans' Affairs to perform the acts in question, and relying upon the same as if demurrer had been specifically interposed, for answer to said petition and return to the rule to show cause or so much thereof as is material for him to answer, says:

1.

That he denies the allegations of paragraph one of the petition for want of knowledge or information sufficient to form a belief.

2.

That he admits that he is a citizen of the United States; that his official residence is in the District of Columbia, and that he is Administrator of Veterans' Affairs. The remaining allegations of this paragraph are denied.

3.

That he admits the allegations contained in para-
18 graph three of the petition.

4.

That he admits the allegations contained in paragraph four except those allegations that are specifically denied.

Further answering this paragraph respondent denies that the judgment set up therein directed the United States of America to pay to petitioner, Wilkinson, the sum of $43.12 monthly from February 5, 1919, under his contract of insurance but avers that said judgment directed the United States of America to pay to petitioner, Wilkinson, $43.12½ per month from February 5, 1919, up to and including the last anniversary date next preceding the filing of petitioner's suit in the cause in which the judgment was rendered and such further installments thereafter accruing by reason of the judgment as provided by law.

Further answering this paragraph respondent avers that the appeal set up therein was dismissed by the Court of Appeals for the Sixth Circuit for failure of the United States of America to comply with Rule 10 of said Court, which rule provides:

"10. Bills of Exceptions. 1. The assignments of error required by rule 11 shall be filed at or before the settling of the bill of exceptions. The evidence in a bill of exceptions shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of some one of the questions presented by the assignments of error being omitted, and the testimony of witnesses being stated only in narrative form, save that, if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.

"2. No general exception to the whole of any charge to a jury on trials at law shall be allowed in any bill of exceptions. Exceptions to a charge, in order to be allowed in a bill of exceptions, must be taken before the jury retires and must state distinctly the several matters of law to which exception is taken. In cases where exception is taken to part of a charge, and such exception may be affected by other parts or by the charge as a whole, the entire charge shall be included in the bill of exceptions."

19 5.

That he admits that monthly payments of benefits under the insurance contract granted petitioner, Wilkinson, as

aforesaid, were made from the date of the award referred to in paragraph four of petitioners' petition until May 4, 1933; that he terminated the award on May 4, 1933, and has refused and still refuses to make any further payments of permanent and total disability benefits to petitioner, Wilkinson, under said contract or said judgment or said award and has refused and still refuses to make any further payments to petitioner, Coleman, under said award; that he denies that he refused to recognize the validity of said yearly renewable term insurance contract but avers that he recognized the right of the petitioner, Wilkinson, to have this said insurance converted to any of the six level premium life or endowment insurance plans, namely, Ordinary Life, 20-Payment Life, 30-Payment Life, 20-Year Endowment, 30-Year Endowment and Endowment at Age 62, and so advised the said petitioner Wilkinson, and further advised him in detail with reference to his right to so convert said yearly renewable term insurance as all of which will appear from the allegations contained in this paragraph of the petitioners' petition; that he denies that he refused to recognize any rights of petitioners under the judgment set out in paragraph four of the petition and avers that petitioners have no rights under said judgment; that he admits that on May 9, 1933, the letter quoted in this paragraph was forwarded to petitioner, Wilkinson. The remaining allegations of this paragraph constitute conclusions of law and facts of the petitioners which the respondent is advised he is not required to answer but if required to answer denies each of said allegations.

6.

That the allegations of this paragraph are denied.

20 Further answering the petition, respondent avers that on April 20, 1933, he determined that petitioner, Thaddeus R. Wilkinson, had recovered his ability to follow continuously some substantially gainful occupation and was and is no longer permanently and totally disabled within the meaning of his contract of yearly renewable term insurance.

Wherefore having fully answered the allegations of the petition, this respondent prays that the Rule to Show Cause

be discharged, the petition dismissed and that he be allowed his reasonable costs herein incurred.

FRANK T. HINES,
Administrator of Veterans' Affairs.

LEO A. ROVER,
United States Attorney.
JOHN J. WILSON,
Assistant United States Attorney.
JAMES T. BRADY,
Acting Solicitor,
Veterans' Administration.

I, Frank T. Hines, Administrator of Veterans' Affairs, do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; that the matters and things therein stated of personal knowledge are true and those stated on information and belief are believed to be true.

FRANK T. HINES,
Administrator of Veterans' Affairs.

Subscribed and sworn to before me this 10″ day of October, 1933.

[SEAL.] CORONA M. HENNESSY,
Notary Public, District of Columbia.

21 *Demurrer to Answer.*

Filed October 30, 1933.

* * * * * * *

Come now the petitioners and say that the answer of respondent is bad in substance.

The matters of law to be argued are the following:

I.

That the decision of respondent on April 20, 1933, "that petitioner Thaddeus R. Wilkinson had recovered his ability to follow continuously some substantially gainful occupation and was and is no longer permanently and totally disabled within the meaning of his contract of insurance", was wholly unsupported by evidence, was unauthorized by law, and was arbitrary and capricious, and of no legal effect.

II.

That the action of respondent in terminating on May 4, 1933, all monthly payments of permanent and total disability benefits to petitioner Thaddeus R. Wilkinson under his contract of yearly renewable term insurance, and a portion of such payments to petitioner George J. Coleman, in conformity with the judgment of the District Court of the United States for the Western District of Tennessee, Western Division, and the award of respondent, was beyond the scope of his authority and contrary to law, and thus arbitrary and capricious, and respondent has deprived petitioners of their property rights under a valid existing contract of yearly renewable term insurance and a valid judgment of a Court of the United States and a valid award by respondent, without due process of law and in contravention of the Fifth Amendment to the Constitution of the United States.

III.

That in attempting to compel petitioner Wilkin-
22 son to enter into a contract of insurance unauthorized by law, and hence illegal and void, or voidable, under penalty of the termination of all of his rights under his existing valid contract of yearly renewable term insurance and thereafter terminating such rights, entailing the loss of all such benefits to said petitioner during his lifetime and to his beneficiary at his death, respondent acted arbitrarily and capriciously and without authority of law, and deprived said petitioner of his property rights without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

IV.

That it is his plain ministerial duty to pay petitioners Wilkinson and Coleman monthly benefits under said contract of yearly renewable term insurance in proportionate shares as fixed by said judgment, or to cause same to be paid.

WM. WOLFF SMITH,
Attorney for Petitioners.

Service of copy of foregoing acknowledged.
JOHN J. WILSON,
Attorney for Respondent.

October —, 1933.

23 Supreme Court of the District of Columbia.

Tuesday, January 2, 1934.

By order of Chief Justice Alfred A. Wheat and Associate Justices O. R. Luhring, James M. Proctor, F. Dickinson Letts and Daniel W. O'Donoghue, of the Supreme Court of the District of Columbia, these Divisions are opened by proclamation of the United States Marshal pursuant to rule of Court.

* * * * * * *

Upon consideration of the demurrer filed herein, to the answer, it is ordered that said demurrer be, and the same is hereby overruled.

LETTS,
Justice.

Wednesday, January 3, 1934.

Session resumed pursuant to adjournment, Hon. F. D. Letts, Justice, presiding.

* * * * * * *

Come now the petitioners by their attorney of record and now. in open Court, elect to stand upon the demurrer filed herein to the answer, and it appearing to the Court that said demurrer was overruled upon the 2nd day of January, 1934, judgment is accordingly ordered in conformity therewith, and the petition filed herein is hereby dismissed and the rule to show cause issued thereon is discharged.

Wherefore, it is considered that petitioners take nothing by this action, that respondent go hence without day, be for nothing held and recover of petitioners his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the petitioners by their attorney of record, in open Court, note an appeal to the Court of Appeals of this District; whereupon, an undertak-
24 ing to act as a cost bond is hereby fixed in the sum of One Hundred Dollars ($100.00) with leave to deposit Fifty Dollars ($50.00) cash with the clerk in lieu thereof.

Memorandum.

January 6, 1934.—$50 deposited in lieu of Undertaking on Appeal.

Assignment of Errors.

Filed January 6, 1934.

* * * * * * *

The Court erred:

1. In not sustaining petitioners' demurrer to respondent's answer.
2. In overruling petitioners' demurrer to respondent's answer.
3. In discharging the rule to show cause.
4. In entering judgment for respondent.
5. In other respects apparent of record.

WM. WOLFF SMITH,
Attorney for Petitioners.

Receipt of copy of foregoing acknowledged January 6, 1934.

JOHN J. WILSON,
Attorney for Respondent.

25 *Designation of Record.*

Filed January 6, 1934.

* * * * * * *

Now come Thaddeus R. Wilkinson and George J. Coleman, petitioners in the above entitled cause, and designate the parts of the record which they desire to be included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal:

1. Petition.
2. Rule to show cause.
3. Answer.
4. Demurrer to answer.
5. Minute entry overruling demurrer, January 2, 1934.
6. Judgment, January 3, 1934.
7. Minute entry of appeal, January 3, 1934.
8. Assignment of errors.
9. This designation.

WM. WOLFF SMITH,
Attorney for Petitioners.

Receipt of copy of foregoing acknowledged January 6, 1934.

JOHN J. WILSON,
Attorney for Respondent.

26 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 25, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 83269 at Law, wherein The United States of America, *ex relatione* Thaddeus R. Wilkinson and George J. Coleman, are Petitioners and Frank T. Hines, Administrator of Veterans Affairs, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of February, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

27 In the Court of Appeals of the District of Columbia,
January Term, 1934.

No. 6165.

UNITED STATES, ex Rel. THADDEUS R. WILKINSON et al.,
Appellants,

v.

FRANK T. HINES, Administrator of Veterans' Affairs,
Appellee.

Stipulation Omitting Papers Included in Transcript of Record as Filed.

It is hereby stipulated, this 14th day of February, 1934, by and between the undersigned counsel for the respective parties in the above entitled cause, that the Clerk shall omit from the printed transcript of record the following pages

or parts thereof which were inadvertently included by the Clerk of the Court below in the record as filed in this cause:

1. Omit the paper entitled "Court Decree", beginning at the lower part of page 11 and continuing through page 12.

2. Omit the letter appearing upon page 13.

3. Omit the Extracts from General Orders appearing on pages 14 and 15.

WM. WOLFF SMITH,
Attorney for Appellants.
LESLIE C. GARNETT,
United States Attorney,
JOHN J. WILSON,
Assistant United States Attorney,
Attorneys for Appellee.

28 [Endorsed:] No. 6165. January Term, 1934. In the Court of Appeals of The District of Columbia. United States, ex Rel. Thaddeus R. Wilkinson et al., Appellants, v. Frank T. Hines, Admr. of Veterans' Affairs, Appellee. Stipulation omitting papers included in transcript of record as filed. Court of Appeals, District of Columbia. Filed Feb. 15, 1934. Henry W. Hodges, Clerk. Leslie C. Garnett, United States Attorney. John J. Wilson, Assistant United States Attorney.

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FOR MR. JUSTICE HOOK

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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Henry W. Hodges
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IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1934

No. 6165

SPECIAL CALENDAR

THE UNITED STATES OF AMERICA, *ex relatione*
THADDEUS R. WILKINSON and GEORGE J. COLEMAN,
Appellants,

vs.

FRANK T. HINES, Administrator of Veterans' Affairs,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1934

No. 6165

SPECIAL CALENDAR

THE UNITED STATES OF AMERICA, *ex relatione* THADDEUS R. WILKINSON and GEORGE J. COLEMAN,
Appellants,

vs.

FRANK T. HINES, Administrator of Veterans' Affairs,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

This action is for a writ of mandamus to direct appellee to resume payments to appellants of permanent and total disability benefits under a contract of yearly renewable War Risk term insurance.

Appellee having denied the claim of appellant Wilkinson for total and permanent disability benefits

under his contract with the United States for yearly renewable War Risk Term Insurance (R. 3), suit was entered in the District Court of the United States for the Western District of Tennessee, Western Division (R. 3), and on December 10, 1931 the court rendered judgment for the plaintiff and fixed the fee of his attorney, appellant Coleman, at 10% of each installment as paid (R. 4, 9-10). Some time after the Circuit Court of Appeals for the Sixth Circuit dismissed the appeal on June 27, 1932 (R. 4, 13), appellee caused the judgment to be paid (R. 4, 14) and then made an award of future installments to be paid monthly to appellants in the proportions of 90% and 10% respectively, as fixed by the judgment (R. 4, 14). Payments under this award were made regularly for some months (R. 4, 14), but on April 20, 1933 appellee cancelled the award on a finding that Wilkinson had recovered his ability to continuously follow a substantially gainful occupation (T. D. 20, *infra*) (R. 4, 14). Payments were terminated as of May 4, 1933 (R. 4, 14).

Appellee then offered to convert the value of the remaining installments of insurance into a contract of Government Life Insurance, provided his offer was accepted by appellant Wilkinson within thirty-one days (R. 4-8, 14). Otherwise appellee would terminate all of appellant's rights to yearly renewable term insurance (R. 6).

Petition for writ of mandamus to direct appellee to restore the award and resume payment of benefits to appellants was filed in the Supreme Court of the District of Columbia, September 29, 1933 (R. 2-9); a rule

to show cause was issued (R. 11); appellee filed his answer (R. 12-15); to which appellants demurred (R. 15); memorandum briefs were filed, arguments were heard, and on January 2, 1934, the court overruled the demurrer without indicating the actuating reasons (R. 17). Appellants stood on the demurrer and the rule was discharged and the petition dismissed. Appellants noted an appeal from this judgment in open court (R. 17) and perfected same.

SPECIFICATION OF ERRORS TO BE URGED

The Court erred:—

(1) In not sustaining petitioners' demurrer to respondent's answer.

(2) In overruling petitioners' demurrer to respondent's answer.

(3) In discharging the rule to show cause.

(4) In entering judgment for respondent.

(5) In other respects apparent of record.

No opinion was rendered by the court below.

POINTS AND AUTHORITIES

I

That the decision of appellee on April 20, 1933, that appellant Wilkinson had recovered his ability to follow continuously some substantially gainful occupation and is no longer permanently and totally disabled within the meaning of his contract of insurance (R. 14), was wholly without evidence to support it and therefore was arbitrary and capricious. Being unauthorized by law it could have no legal effect (R. 15).

II

That the action of appellee in terminating on May 4, 1933, all monthly payments of permanent and total disability benefits to appellant Wilkinson under his contract of yearly renewable term insurance, and a portion of such payments to appellant Coleman, which payments were being made in conformity with the judgment of the District Court of the United States for the Western District of Tennessee, Western Division, and the award of appellee, was beyond the scope of his authority and contrary to law, and hence arbitrary and capricious (R. 8).

Authorities for Points I and II

Section 17 of Public No. 2, 73d Congress, Act of March 20, 1933, c 3, Title 1, 48 Stat. 11, Title 38 U. S. C. 717.

Sam Silberschein *v.* United States, 266 U. S. 221, 45 Sup. Ct. 221, 69 L. ed. 256.

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Wilbur *v.* United States *ex rel.* Chestatee Pyrites and Chemical Corporation, 288 U. S. 97, 53 Sup. Ct. 293, 77 L. ed. 638.

Worley *v.* United States, 281 U. S. 339, 341, 74 L. ed. 887, 889, 890, 50 Sup. Ct. 291.

III

Appellee has deprived appellants of their property rights under a valid existing contract of yearly renewable term insurance and a valid judgment of a court of the United States and a valid award by appellee, without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

IV

That in attempting to compel appellant Wilkinson to enter into a contract of insurance unauthorized by law, and hence illegal and void, or voidable, under penalty of the termination of all of his rights under his existing valid contract of yearly renewable term insurance, and thereafter terminating such rights, entailing the loss of all benefits to said appellant during his lifetime and to his beneficiary at his death, appellee acted arbitrarily and capriciously, and without authority of law, and deprived appellant of his property rights without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States. (R. 7, 8, 16.)

Authorities for Points III and IV

Section 17, Public No. 2, 73d Congress, *supra.*

The Fifth Amendment to the Constitution of the United States.

Federal Radio Commission *v.* Nelson, 289 U. S. 266, 53 Sup. Ct. 506, 77 L. ed. 1166.

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Federal Trade Commission *v.* Raladam Company, 283 U. S. 643, 654, 51 Sup. Ct. 587, 75 L. ed. 1324.

Crowell *v.* Benson, 283 U. S. 22, 76 L. ed. 598, 52 Sup. Ct. 285.

Noble *v.* Union Logging Company, 147 U. S. 165, 37 L. ed. 123.

People *ex rel.* McCauley *v.* Brooks, 16 Cal. 11.

Yick Wo. *v.* Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. 1064.

Worley *v.* United States, 281 U. S. 339, 341, 74 L. ed. 887, 889, 890, 50 Sup. Ct. 291.

V

That it is the plain ministerial duty of appellee to pay appellants monthly benefits under said contract of yearly renewable term insurance in proportionate shares as fixed by the judgment of the court, or to cause same to be paid (R. 16).

Authorities for Point V

Roberts *v.* United States *ex rel.* Valentine, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. 376, (distinguished from United States *ex rel.* Dunlop *v.* Black, 128 U. S. 40, 32 L. ed. 354.

Lane *v.* Hogland, 244 U. S. 174, 61 L. ed. 1066, 37 Sup. Ct. 558.

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United States *v.* Schurz, 102 U. S. 378, 26 L. ed. 167.

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ARGUMENT

Succinctly stated the issues resolve themselves into allegations on the part of appellants that there is no authority of law for appellee to make the finding that appellant Wilkinson had recovered his ability to continuously follow some gainful occupation, and that there was no evidence before appellee to support such determination; that there was no authority of law for appellee to terminate the award of monthly payments to appellants or to warrant the offer of a converted Government Life Insurance contract to appellant Wilkinson under threat of terminating all of his right under his yearly renewable term insurance contract; on the contrary the law clearly provides that such payments should be continued.

Therefore, say appellants, appellee acted beyond the scope of his authority, without authority of law and

contrary to law, hence arbitrarily and capriciously, and thus has deprived appellants of their property rights without due process of law, in contravention of the Fifth Amendment to the Constitution.

POINTS I AND II

As Points I and II are closely related they will be discussed together.

(I) That the decision of appellee on April 20, 1933, that appellant Wilkinson had recovered his ability to follow continuously some substantially gainful occupation and is no longer permanently and totally disabled within the meaning of his contract of insurance (R. 14), was wholly without evidence to support it and therefore was arbitrary and capricious. Being unauthorized by law it could have no legal effect (R. 15).

(II) That the action of appellee in terminating on May 4, 1933, all monthly payments of permanent and total disability benefits to appellant Wilkinson under his contract of yearly renewable term insurance, and a portion of such payments to appellant Coleman, which payments were being made in conformity with the judgment of the District Court of the United States for the Western District of Tennessee, Western Division, and the award of appellee, was beyond the scope of his authority and contrary to law, and hence arbitrary and capricious (R. 8).

Up to the present time appellee has proceeded on the theory that he is authorized by law to terminate payment of insurance benefits to a veteran under a contract of yearly renewable term insurance, at any time appel-

lee determines the veteran has recovered his ability to continuously follow some substantially gainful occupation, notwithstanding the fact that after appellee had denied that the veteran was permanently and totally disabled the veteran had brought suit against the United States and had demonstrated to the satisfaction of a court or jury that he was so disabled and was entitled to insurance benefits regardless of appellee's views or decision, and often, as in this instance, after the veteran prevailed in a Court of Appeals.

That is appellee's position in the instant case, so it will be necessary to examine the state of the law prior to March 20, 1933, and after that date, because on that date "all laws granting or pertaining to yearly renewable term insurance" were repealed, with some saving clauses (§17, Act of March 20, 1933, C. 3, Title 1, §17, 48 Stat. 9, Title 38, USCA 705, *infra*).

Section 400 of the Act of October 6, 1917, (C. 105, S. 400, 40 Stat. 409), which amended the War Risk Insurance Act of September 2, 1914 (38 Stat L. 711), to provide insurance for soldiers and sailors, stipulated that such insurance should cover permanent and total disability as well as death. Sections 401 and 402 of the same act provided for the publication of the terms and conditions of the contract, and on October 15, 1917, Bulletin No. 1, of the Bureau of War Risk Insurance was issued, defining such terms and conditions and containing the following provision:

> "To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as *es-*

tablished by the award of the director of the bureau, and continuing during such disability." (Italics ours.)

There the matter rested until three important considerations arose. The first was that there was no concrete definition of total and permanent disability. The second was that no provision of law had been made for terminating insurance benefits as contemplated in the sentence quoted from Bulletin No. I, *supra.* The third was the failure to provide for the conversion of the commuted value of the remaining installments of insurance into a Government Life Insurance contract if payments were terminated after the date fixed by law as the last date on which such conversion could be made.

The first and second points were covered by Treasury Decision No. 20, Bureau of War Risk Insurance, issued under authority of the Secretary of the Treasury under date of March 8, 1918, which provided as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.
>
> "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to con-

tinuously follow any substantially gainful occupation the payment of installments or insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

But the Secretary of the Treasury was without authority to provide for the conversion of yearly renewable term insurance contracts where payments were not terminated until after the expiration of the time limit for conversion. Consequently on August 9, 1921, the law was amended to provide for such cases (Section 404 War Risk Insurance Act, as amended) and the provision was incorporated in the World War Veterans Act of 1924, Section 301, (June 7, 1924, C. 320, S. 301, 43 Stat. 624, 38 USCA 512), and reads as follows:

> In case where an insured whose yearly renewable term insurance has matured, by reason of total permanent disability is found and declared to be no longer permanently and totally disabled, and where the insured is required under regulations to renew payment of premiums on said term insurance and where this contingency is extended beyond the period during which said yearly renewable term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to convert said term insurance as hereinbefore provided." (Reenacted March 4, 1925, C. 553, S. 13, 43 Stat. 1309).

It is apparent that Bulletin No. I applies solely to a finding by appellee. The language of T. D. No. 20,

however, is not so certain. It says: "Whenever it shall be established * * * " but fails to stipulate the manner in which the recovery of the insured "shall be established." Section 301 of the World War Veterans Act is also indefinite on this point the language being: "*is found and declared* to be no longer permanently and totally disabled," (italics ours) without indicating how or by whom the finding should be made or declared.

It may be assumed that the Secretary of the Treasury and the Congress had in mind a decision by appellee's predecessors in office, or by appellee himself, but the inference is strong that they contemplated that the finding of recovered ability should be made by appellee only in those cases where appellee or his predecessors had made the original finding of permanent and total disability.

It is obvious that if the finding of recovered ability is sound then the original finding of permanent and total disability must have been erroneous, and appellee, at least until March 20, 1933 was doubtless authorized to correct his own errors and probably those of his predecessors, although the latter contention has been questioned. But was appellee ever authorized by law to correct what he conceived to be an erroneous conclusion on the part of a court or jury in deciding a suit for War Risk Insurance? Appellants believe he was never so authorized.

As suit for permanent and total disability benefits could be instituted only after and because of a denial of such benefits by appellee (Sec. 405, Act of Oct. 6, 1917, reenacted as Sec. 19, Act of June 7, 1924, and

amended, 38 USCA 445) an anomalous situation would be presented if, after the judgment of a court to the effect that the veteran was permanently and totally disabled and had been so disabled for many years, the same person who had formerly declared the contrary and had forced the veteran to sue for his rights could reverse the effect of the appeal from his decision to the court by the simple expedient of making a finding of recovered ability and terminating insurance payments.

It would also follow that under Section 19 *supra,* the insured could have appealed to the court a second time, and if the court or jury sustained his contention appellee for a second time could make a finding of recovered ability, and this could continue indefinitely. Is it logical to assume that Bulletin No. I, T. D. 20, or 38 USCA 512 contemplated such a proceeding? We believe not, and invite the attention of the court to the absurd situation which would follow as to attorney's fees.

Appellants are firmly of the belief that the Congress, when it gave the right to sue, anticipated that the dispute between the appellee and the insured would be terminated by the judgment of the court. It is certain that when the claimant loses and appellee's position is sustained the claimant is through. To use a homely expression: "It's a poor rule that won't work both ways."

In the answer to the second question certified by the Circuit Court of Appeals for the Eighth Circuit in the case of *Worley* v. *United States* (281 U. S. 339, 341, 74 L. ed. 887, 889, 890, 50 Sup. Ct. 291), the Supreme Court said:

> "Undoubtedly, when one's right to recover is established by judgment the Veterans' Bureau will pay him installments maturing in his favor after the commencement of the action."

Appellants believe that a proper deduction from this language is that the Court was under the impression that when a veteran had established to the satisfaction of a court and/or jury, over the strenuous opposition of the Veterans' Administration, that he was permanently and totally disabled and had been so disabled for twelve or fifteen years, he would continue to receive the monthly installments of insurance under his contract without being subject to the termination of such payments at the will of the head of the bureau or his subordinates.

As appellants understand appellee's position it is that although he can no longer adjudicate claims for yearly renewable term insurance benefits under the first part of T. D. 20, *supra,* and Bulletin No. I, he can discontinue payment of benefits under Bulletin No. I, and the latter part of T. D. 20 because they are a part of the contract of insurance *White* v. *United States,* 270 U. S. 175, 180, 46 Sup. Ct. 274, 70 L. ed. 530. The reasoning that the part of the contract operating against the insured's interest is preserved while the part permitting the adjudication of his claim has been abrogated is not clear to appellants.

The situation is the more serious at the present time for while appellee claims the right to discontinue payments the government is contending that since March 20, 1933, the veteran's right to appeal to the courts has

been withdrawn, *Lynch* v. *United States* (CCA 5th C) 67 Fed. (2d) 490, certiorari granted April 9, 1934; *Wilner* v. *United States* 68 Fed. (2d) 442, certiorari granted April 9, 1934. Yet the right of the veteran to have his claim adjudicated, and to appeal to the courts in event of a denial of the claim, was a part of the original contract Act of October 6, 1917, *supra, White* v. *United States, supra.*

What has the Congress said as to the matter?

The whole law on the subject is contained in Section 17 of Public No. 2, Act of March 20, 1933, c.3, Title I, 48 Stat. 11, Title 38 U.S.C. 717, the pertinent provisions of which are as follows:

> "* * * and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted. The Administrator of Veterans' Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions of this Act commencing with the first day of the fourth calendar month following the month during which this Act is enacted and notwithstanding the provisions of section 9 of this Act, no further claim in such cases shall be required: *Provided,* That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance

which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *"

Analyzing this language we find, first that "all laws granting or pertaining to yearly renewable term insurance are hereby repealed." Consequently, any authority which appellee may have had in the instant case, to review, to terminate payments or even to continue payments, vanished. If the Congress had stopped there that would have been the end, but it realized that would never do, so it went on to provide: "but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted." If it had stopped there, of course all payments would have terminated on June 30, 1933, but the Congress then provided for a review of "all allowed claims." Bearing in mind that all prior laws had been repealed it necessarily follows that whatever authority appellee had to review or act upon an "allowed" claim, such as that in the instant case, he must derive it from Section 17 (*supra*).

By that section he was not only authorized but directed in the most imperative language to make a review. "The Administrator of Veterans Affairs shall immediately cause to be reviewed all allowed claims under the above referred to laws, and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions

of this Act commencing with the first day of the fourth calendar month following the month during which this Act is enacted, and notwithstanding the provisions of Section 9 of this Act, no further claim in such cases shall be required."

Up to this point it must be conceded on the one side that there is nothing in Section 17 authorizing appellee to deny any person whose claim to yearly renewable term insurance had been allowed under the repealed Acts, future payments of benefits on the ground that he had recovered his ability to pursue a gainful occupation. On the other side it must be conceded that up to this point appellee was without authority to continue payments on matured contracts of yearly renewable term insurance, so the Congress undertook to correct this situation, as far as continuing or making payments were concerned, and incorporated in Section 17 this proviso:

> "PROVIDED that nothing contained in this section (which includes the repeal of the prior Acts, the authority of respondent to review, and the authority of respondent to determine whether a person is entitled to benefits under the Act,) shall interfere with payments heretofore made or *hereafter to be made,*
>
> 1. "under contracts of yearly renewable term insurance which have matured prior to the date of the enactment of this Act, and under which payments have been commenced, (2) or any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, (3) or which may hereafter

be rendered in any such suit now pending." (Emphasis and matter in parentheses supplied.)

It is significant that the Congress made no provision for terminating these payments by any finding of recovered ability nor for the conversion of insurance where payments were so terminated. The conclusion is inescapable that Congress desired to bring the matter to a close and believed that payments of benefits in cases covered by the proviso should not be disturbed.

It is assumed that appellee would not contend that the foregoing gives him any right to refuse payment in the third class, why then, in classes one and two? Appellants' rights are protected by both clauses one and two, because the contract was matured by the judgment of a court of competent jurisdiction in the first instance, and appellee, having paid the judgment, adopted the findings of the court and himself awarded monthly benefits, awarding 10% of the installments to appellant Coleman solely because of the judgment. These payments were commenced prior to March 20, 1933, and were continuing on that date, *Hatch* v. *United States*, 29 Fed. (2d) 213.

To appellants it seems clear that in no event could appellee terminate payments in the instant case prior to June 30, 1933, and that when, on the review authorized by the new Act, he found that this case came within the protection of the proviso, there remained but a plain ministerial duty to be performed, namely, to authorize the payment of monthly benefits after July 1, 1933. This duty he failed to perform, but on the contrary on April 20, 1933, made a finding that appellant Wilkinson

was no longer permanently and totally disabled, without any evidence to support such finding, at least, no evidence has been alleged or produced by appellee who alone possesses such evidence if any exists. Of course appellants can produce none.

Then on the strength of this finding, appellee terminated payments to the appellants as of May 4, 1933, thus depriving them of two installments, those of May and June, to which they are clearly entitled under the terms of Section 17, *supra,* and he has not only refused to restore the rights of appellants to monthly payments of benefits but has determined that all of appellant Wilkinson's right under his term insurance contract have ceased and terminated, and, of course, this determination deprives appellant Coleman of his rights under the judgment.

It is indicated that appellee will claim that appellants have stated no facts on which their allegations that he acted arbitrarily and capriciously can be sustained. Appellants believe in their pleadings and this brief they have conclusively shown that appellee acted without authority of law and contrary to law and if that is not acting arbitrarily and capriciously petitioners fail to grasp the meaning of the words. (*Wilbur* v. *United States ex rel. Krushnic,* 280 U. S. 306, 319, 74 L. ed. 445-451.)

Points III and IV

As these points are closely related they will be discussed together.

III. Appellee has deprived appellants of their property rights under a valid existing contract of yearly re-

newable term insurance and a valid judgment of a court of the United States and a valid award by appellee, without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

IV. That in attempting to compel appellant Wilkinson to enter into a contract of insurance unauthorized by law, and hence illegal and void or voidable, under penalty of the termination of all of his rights under his existing valid contract of yearly renewable term insurance, and thereafter terminating such rights, entailing the loss of all benefits to said appellant during his lifetime and to his beneficiary at his death, appellee acted arbitrarily and capriciously, and without authority of law, and deprived appellant of his property rights without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States (R. 7, 8, 16).

In connection with the foregoing it should be noted that as payments of benefits under yearly renewable term insurance contracts are made from moneys annually appropriated by Congress for the Military and Naval Insurance Fund the ultimate effect of the action of appellee was to escheat to the United States the value of the monthly installments of insurance remaining unpaid after May 4, 1933. Appellants believe such action constituted the taking of private property for public use without just (or any) compensation, in contravention of the Fifth Amendment to the Constitution (R. 8, 16).

Volumes have been written and doubtless many others will be, interpreting, construing and expounding

the phrase "due process of law," in the Fifth Amendment. As appellants sense the import of the many learned opinions reviewed, the meaning of the phrase, when the action of an executive official, board or commission, is under judicial examination, is that if the decision of the official, board or commission is based upon evidence and the action taken is authorized by law, there is sufficient compliance with the due process clause, even if the court proceeding *de novo* would have reached a different conclusion on the evidence. But if the action is not authorized by law, or is contrary to law, the quality and quantity of evidence is immaterial; or if the action is authorized by law but there is no evidence to support it, in either case "due process of law" has not been observed. *Silberschein* v. *United States,* 266 U. S. 221, 45 Sup. Ct. 221, 69 L. ed. 256.

Appellants believe that in the preceeding discussion they have established that appellee reached his conclusion without evidence to support it, and that his action not only was not authorized by law but was contrary to law. It follows that it violated the "due process" clause. But, says appellee, petitioners have no vested rights in future installments of insurance. The reply of petitioners is that such rights are so vested that at least they cannot be divested by any authority short of an Act of the Congress itself or the exercise of authority clearly and unequivocally delegated by the Congress, and neither presently exists.

Appellants further believe appellee has no authority to transfer liability for insurance benefits from the Military and Naval Insurance Fund, now wholly dependent upon appropriations from the United States

Treasury, to the Government Life Insurance Fund which is exclusively derived from premiums paid by policy-holders and is a Trust Fund held in the United States Treasury for the sole purpose of paying dividends and permanent and total disability benefits to policyholders, and death benefits to their beneficiaries, of which fund respondent is Trustee. (R. 7, 8.) *Utah Power and Light Co.* v. *United States,* 243 U. S. 389, 409, 61 L. ed. 791, 818, 37 Sup. Ct. 387.

Whatever authority existed to enter into a contract of Government Life Insurance under such circumstances was contained in Section 301 of the World War Veterans Act, *supra* and under that section appellant Wilkinson would have two years within which to convert his insurance whereas appellee allowed him only 31 days.

To avoid repetition the attention of the Court is respectfully invited to the allegations of the petition (R. 4, 5, 6 and 7) and in that connection the question is pertinent whether such contracts could be enforced in the courts under Section 19 of the World War Veterans' Act of 1924, as amended (38 U. S. C. 445).

Point V

That it is the plain ministerial duty of appellee to pay appellants monthly benefits under said contract of yearly renewable term insurance in proportionate shares as fixed by the judgment of the court, or to cause same to be paid (R. 16).

Appellants repeat for emphasis what is said *supra,* that to appellants it seems clear that in no event could appellee terminate payments in the instant case prior to

June 30, 1933, and that when, on the review authorized by the new act he found that this case came within the protection of the proviso in §17, there remained but a plain ministerial duty to be performed, namely, to authorize the payment of monthly benefits after July 1, 1933. If appellee ever had any discretion in the matter, or ever had any authority to terminate payments in the instant case without showing cause to the court which gave the judgment, such authority was revoked by the Congress when it repealed the laws from which appellee claims to have derived his authority, and his hands were tied by the proviso in §17, *supra.*

> "Unless the writ of mandamus is to become practically useless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute this writ should be granted." *Roberts* v. *United States, ex rel. Valentine,* 176 U. S. 221, 44 L. ed. 443 (Distinguished from *United States ex rel. Dunlop,* 128 U. S. 40, 32 L. ed. 354).
>
> "The record discloses that the Secretary's action was based upon improper construction and application of the law. * * * The judgment of the Supreme Court, affirmed by the Court of Appeals, authorized a writ of mandamus directing that the Secretary of the Interior should treat the disputed items in the respondent's claim as permissible *as a matter of law,* and to proceed with their final adjustment upon consideration of all the facts. We approve this action and affirm the judgment. *Wilbur* v. *United States, ex rel. Chestatee Pyrites and Chemical Corporation,* 288 U. S. 97, 53 Sup. Ct. 293, 77 L. ed. 638.

Respectfully submitted,

WILLIAM WOLFF SMITH,
Counsel for appellants.

FILED SEP 27 1934

No. 6165

In the United States Court of Appeals for the District of Columbia

JANUARY TERM, 1934

THE UNITED STATES OF AMERICA, EX RELATIONE THADDEUS R. WILKINSON AND GEORGE J. COLEMAN, APPELLANTS

v.

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

LESLIE C. GARNETT,
United States Attorney.
JOHN J. WILSON,
Assistant United States Attorney.
JAMES T. BRADY,
Acting Solicitor, Veterans' Administration.
BAYLESS L. GUFFY,
Attorney, Veterans' Administration.

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In the United States Court of Appeals for the District of Columbia

JANUARY TERM, 1934

No. 6165

SPECIAL CALENDAR

THE UNITED STATES OF AMERICA, EX RELATIONE Thaddeus R. Wilkinson and George J. Coleman, appellants

v.

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, appellee

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

We believe the appellants' statement of the case is sufficient and that therefrom can be gleaned the only real question involved in this appeal, namely, whether the Administrator of Veterans' Affairs has jurisdiction or authority under the law to terminate an award under a contract of yearly re-

newable term insurance, pursuant to a finding that the insured, appellant Wilkinson in this case, is no longer permanently and totally disabled and thus not entitled to benefits under his contract, in spite of the fact that a United States District Court had, in a suit filed by the insured, found that the insured became permanently and totally disabled while his contract was in force and rendered judgment for accrued benefits under said contract.

At the outset it is to be noted that the appellants' demurrer to the appellee's answer admits the truth of the averment therein that the appellee, on April 20, 1933, determined that appellant Wilkinson had recovered his ability to follow continuously some substantially gainful occupation, and was and is no longer permanently and totally disabled within the meaning of his contract of yearly renewable term insurance (R. 14).

The appellants, relying upon conclusions of law both in their petition and in their demurrer, claimed that this action on the part of the appellee was arbitrary and capricious because—

> (1) The action of appellee in terminating the monthly payments was contrary to law; and
>
> (2) His decision was wholly without evidence to support it.

The appellants thirdly contend that they have been deprived of their property rights without due process of law.

The appellants' fourth point, described on Page 5 of their brief, and elaborated upon on Pages 20–22 thereof, is, we submit, wholly without merit, and has absolutely no place in this case. We are therefore taking the liberty of summarily answering this point at this time by directing attention to the fact that the appellant Wilkinson did not enter into any other contract of insurance; that the termination by the appellee of the monthly payments was not, in any wise, connected with the exchange of insurance contracts; and that the relief sought by the appellants in their petition for mandamus concerns simply the restoration of monthly payments under the appellant Wilkinson's contract of yearly renewable term insurance.

Appellants' fifth point contends that, in view of the judgment of the District Court for the Western Division of the Western District of Tennessee, it is the plain ministerial duty of appellee to pay appellants the monthly benefits under the yearly renewable term insurance contract.

ARGUMENT

I

Appellee acted in accordance with law

The contract of insurance involved herein and the actions taken by appellee were pursuant to the following statutes of the United States and regulations promulgated by authority thereof:

Section 400 of the War Risk Insurance Act, 40 Stat. 409:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

Section 402 of the W.R.I.A., 40 Stat. 615:

> That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person or to any or all of them.

Section 13 of the W.R.I.A., 40 Stat. 555:

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose

have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in Section 5. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: * * *.

Bulletin No. 1:

I, William C. DeLanoy, Director of the Bureau of War-Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An act to authorize the establishment of a Bureau of War-Risk Insurance in the Treasury Department', approved September 2, 1914, and

for other purposes", approved October 6, 1917, hereby, on this 15th day of October 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act: * * *

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability: and * * *.

Treasury Decision No. 20:

* * * Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue. * * *.

Section 404 of the W.R.I.A., 42 Stat. 155:

* * * In case where an insured whose yearly renewable term insurance has matured by reason of total permanent disability is found and declared to be no longer permanently and totally disabled, and where the insured is required under regulations to renew payment of premiums on said term insur-

ance, and where this contingency is extended beyond the five-year period during which said yearly renewable term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to convert said term insurance as hereinbefore provided. * * *.

Section 2 of the W.R.I.A., 42 Stat. 148:

The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes and shall decide all questions arising under this Act except as otherwise provided herein.

Section 301 of the World War Veterans' Act, 38 U.S.C. 512:

* * * In case where an insured whose yearly renewable term insurance has matured by reason of total permanent disability is found and declared to be no longer permanently and totally disabled, and where the insured is required under regulations to renew payment of premiums on said term insurance, and where this contingency is extended beyond the period during which said yearly renewable term insurance otherwise must be converted, there shall be given such

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insured an additional period of two years from the date on which he is required to renew payment of premiums in which to convert said term insurance as hereinbefore provided. * * *.

Section 5 of the W.W.V.A., 38 U.S.C. 426:

The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, *and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person.* Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the

proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards. (Italics supplied.)

Section 3200, Regulations and Procedure, United States Veterans' Administration:

Establishment of the Insurance Claims Council.—There is hereby established in the insurance service, central office, an insurance claims council which will be in charge of a chief who shall be responsible to the director of insurance for the proper functioning of such council. The council shall be composed of such other personnel as may be found necessary for the purpose of carrying on the duties and functions assigned thereto (November 1, 1931).

Section 3201, Regulations and Procedure, United States Veterans' Administration:

Duties of the Insurance Claims Council.—(C) The insurance claims council is vested with exclusive jurisdiction in rendering decisions terminating total and permanent disability and total disability for insurance purposes which had previously been estab-

lished in cases in which payments of insurance benefits had been made founded upon such previous decisions (November 1, 1931).

While appellants in support of their points one and two question the authority of appellee, as Administrator of Veterans' Affairs, to find that an insured under a contract of yearly renewable term insurance has recovered his ability to follow continuously a substantially gainful occupation and is no longer permanently and totally disabled, their main reliance is that, conceding such authority generally, appellee did not have such authority in a case in which a United States District Court had found that such an insured had become permanently and totally disabled on a given date and rendered its judgment accordingly.

The judgment of the United States District Court in this case, appellee's Answer (R. 13), directed the United States of America to pay petitioner Wilkinson $43.12½ per month from February 5, 1919, up to and including the last anniversary date preceding the filing of petitioner's suit in the cause in which judgment was rendered and such further installments thereafter accruing by reason of the judgment as provided by law. So it is seen that the judgment did not even undertake to direct the payment of benefits after the date thereof and, in fact, limited payment of the installments which had accrued at the filing of the petition. The judgment further provided that install-

ments accruing should be paid as provided by law. So we assert the District Court recognized that payment of further benefits should be controlled by law and not by its judgment.

The case of the *United States* v. *Mattie Puckett Worley,* administratrix of the estate of Emmet A. Puckett, deceased, et al., 281 U.S. 339; 74 L. Ed. 887, was certified to the Supreme Court by the Circuit Court of Appeals for the Eighth Circuit on four questions, one being, "May judgment be entered against the United States for amount of insurance installments accruing after the action was instituted?"

Answering the above question, the Supreme Court said (p. 341):

> Undoubtedly, when one's right to recover is established by judgment, the Veterans' Bureau will pay him installments maturing in his favor after the commencement of the action. It therefore is a matter of no practical importance whether the installments maturing between the date of intervention and entry of the judgment be included. But the certificate does not disclose any supplemental petition in respect of such installments, and the judgment should not include them. *Hamlin, Hale & Co.* v. *Race,* 78 Ill. 422. *Carter-Crume Co.* v. *Peurrung,* 99 Fed. 888, 890.

While the court in the *Worley case, supra,* said, "Undoubtedly when one's right to recover is estab-

lished by judgment, the Veterans' Bureau will pay him installments accruing in his favor", etc., a reference to the statement of the case contained in the opinion will disclose that in using this language the court did not have in mind future installments; that is, installments accruing after the date of the judgment, but had in mind installments accruing from the date the petition was filed until the rendition of the judgment. The statement to which we refer (p. 340) is:

> April 23, his mother as administratrix brought this action * * *. July 6, she intervened as beneficiary to recover installments maturing after his death. There was a verdict on which, October 31, 1928, judgment was entered in her favor as administratrix for $6,095 and as beneficiary for $3,905. Later the District Court entered a supplemental judgment that as beneficiary she was then entitled to $1,265 on account of installments falling due before the original judgment; * * *.

In the above quotation from page 341 it is to be noted that the court said: "But the certificate does not disclose any supplemental petition in regard to such installments and the judgment should not include them." It is clear from the language just quoted, when considered with the date of the filing of the petition and the date of the verdict and supplemental judgment, that the plaintiffs were contending that they should recover installments ac-

cruing from the date of the filing of the petition to the rendition of the judgment and that this recovery was denied by the court for the reason that no supplemental petition was filed claiming such recovery and lead the court to use the language that the Bureau would undoubtedly pay the installments. In fact, this is clear by the language of the court that "the Veterans' Bureau will pay him installments maturing in his favor *after the commencement of the action.*" (Italics ours.)

In the case of the *United States* v. *Lyke,* 19 Fed. (2d) 876, concerning a suit on a contract of yearly renewable term insurance such as is involved in the instant case, the trial court rendered judgment for the aggregate of the installments accruing from the date of permanent and total disability, as found, to the date of the judgment, and further adjudged that the insured be paid the sum of $57.50 on the first day of each month thereafter for a period of one hundred ninety months, provided that if on a proper showing to the court that a change of conditions affecting the disability of the plaintiff constituted an error to continue said payments, the judgment would be modified accordingly. The United States appealed from this judgment to the Court of Appeals for the Ninth Circuit, assigning as error, among others, that part of the judgment providing for the recovery of installments subsequent to the date of the judgment. In disposing of the appeal the Court of Appeals in part said (p. 877):

> It is assigned as error that judgment was rendered for the payment of future installments on the contract. We cannot agree that the amendment of March 4, 1925 (43 Stat. 1311 [Comp. St. § 9127½—500]), which empowers the trial court to determine a reasonable attorney's fee for the successful party and apportion same, * * * authorizes by implication the entry of judgment for payments of installments to be made in futuro * * *. We think it clear that the trial court could not render a binding judgment for payment of future installments on the contract of insurance. *Napoleon* v. *U.S.* (C.C.A.), 296 Fed. 811. While we are not convinced that such portion of the entry is the entry of a judgment enforceable as such, or is other than the expression of the court's construction of the contract, resulting in the conclusion that the insured should be entitled to receive future installments as they fall due, unless upon proper showing a modified judgment should thereafter be entered, we think it should be eliminated from the judgment.
>
> The judgment, so far as it includes interest and the repayment of premiums to the insured, and the payment of future installments, * * * is reversed; in other respects it is affirmed.

In the case of the *United States* v. *Charles Jackson,* 34 Fed. (2d) 241, likewise a suit on a contract of yearly renewable term insurance such as involved in the instant case, the trial court ordered

and adjudged that plaintiff recover in the sum of $57.50 for each and every month from October 30, 1918, to date of such judgment, February 16, 1928, together with interest and that the judgment bear interest at the rate of six percent. The judgment further ordered that (p. 241)—

> * * * from and after this date the bureau of war risk insurance shall pay directly to the plaintiff the sum of $57.50 per month as long as he shall live, and his permanent disability shall continue, unless the plaintiff shall forfeit his right to the same as provided by the war risk insurance act. Jurisdiction of this cause is reserved in order that the defendant may at any time present to this court and in this action any showing as to why such payments so directed to be made should cease.

The United States appealed from the judgment *supra,* assigning as error the action of the court in reserving jurisdiction to determine whether payment of future installments should cease.

In reversing the judgment of the lower court the Court of Appeals for the Tenth Circuit in part said (p. 242):

> First, with reference to the question of reserved jurisdiction. It is well settled that the court was without authority to render judgment for payment of future installments on the contracts of insurance, *U.S.* v.

Lyke (C.C.A. 9), 19 Fed. (2d), 876, 878; *U.S.* v. *Napoleon* (C.C.A. 5) 296 Fed. 811, 815.

In its discussion of this point the court said (242):

> The United States cannot be sued, except by its own consent, and the right of the insured to sue the United States upon a contract of war-risk insurance is given solely by the provisions of Sec. 445, Title 38, U.S.C., (38 U.S.C.A. § 445), which reads, in part, as follows:
>
> "In the event of disagreement as to claim under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons, or any one of them, resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28, insofar as applicable."
>
> The right to sue upon such a claim, under this statute, arises only in the event of disagreement between the bureau and the insured in respect to such claim. In the instant case the right of the appellee to future installments under his contract of insurance

depends upon the continuation of total permanent disability. If he should recover the ability to follow a substantially gainful occupation, his right to receive such future installments would cease, under the provisions of Treasury Regulation No. 11. The determination of such a recovery, in the first instance, rests with the bureau of war-risk insurance. The jurisdiction of a District Court of the United States to determine whether the appellee had so recovered would not arise until a disagreement had occurred relative thereto between the insured and the bureau.

It is therefore our conclusion that the trial court erred in undertaking to reserve jurisdiction to determine whether the payment of future installments should cease. *United States* v. *Lyke, supra,* pages 877, 878 of 19 F. (2d).

The *Jackson case, supra,* went to the Supreme Court on writ of Certiorari. In disposing thereof that court said: "* * * The case is ruled by this court's decision on the third question certified in *United States* v. *Worley,* announced this day, *ante,* p. 339." *Jackson* v. *United States,* 281 U.S. 344, 345.

Had the Supreme Court been of the opinion in the *Worley case, supra,* that the Veterans' Administration should continue payment of installments accruing subsequent to the rendition of the judgment, it certainly would have so expressed itself in

disposing of the *Jackson case,* in which the Circuit Court had laid down the positive rule that courts did not have jurisdiction after the rendition of a judgment to determine when and whether the insured recovered his ability to follow continuously some substantially gainful occupation, but that jurisdiction to make such determination rested with the Veterans' Administration or Veterans' Bureau, and that its action, so binding, would constitute disagreement authorizing a new suit on the contract.

We think the foregoing establishes the law to be that appellee, as Administrator of Veterans' Affairs, is not by judgment ousted from his jurisdiction to determine that an insured under a contract of yearly renewable term insurance has recovered his ability to follow continuously some substantially gainful occupation and is no longer permanently and totally disabled, provided, of course, such jurisdiction otherwise exists, and to this question we now come.

As heretofore appears in this brief, p. 4, Section 402 expressly provided that benefits should be paid *during* total and permanent disability. More than this, the amendment of August 9, 1921, to Section 404 of the War-Risk Insurance Act provided: "In case where an insured whose yearly renewable term insurance had matured by reason of total permanent disability is found and declared to be no longer permanently and totally disabled", and the provisions of this amendment were carried forward into

the World War Veterans' Act codifying all War-Risk Insurance laws, Title 38, U.S.C.A., and remain the law today.

From the foregoing at least two requisites stand out, namely:

> (1) That permanent and total benefits should be paid only during permanent and total disability.
>
> (2) The recognition that an insured found to be permanently and totally disabled might recover his ability.

The first of the foregoing is established by Section 402, which says, "The insurance shall be payable only to a spouse, child, grandchild, parent, brother or sister, *and also during total and permanent disability* to the injured person" (italics ours), and Bulletin No. 1, which says, "To the insured if he/she, while this insurance is in force, shall become permanently and totally disabled, commencing with such disability as established by the award of the director of the bureau and *continuing during such disability.*" (Italics ours.) The second is established by Treasury Decision No. 20, the above referred to amendment to Section 404 of the War Risk Insurance Act and Section 301 of the World War Veterans' Act.

But the appellants say that there is no authority in any one to find or determine that an insured has recovered his ability, so our attention will now be directed to this feature of the case.

It would be an exceedingly absurd thing for the Congress and Administrative Officer of the Veterans' Bureau or Veterans' Administration to say that permanent and total benefits should be paid only while the insured was permanently and totally disabled and to provide what should be done in the event the insured became no longer permanently and totally disabled, and then to make no provision for determining such fact. Of course, no such omission has occurred.

The question whether an insured has recovered his ability is one of fact, so we look to the Acts of Congress for enlightenment as to who should determine or decide questions of fact rising under the different War Risk Insurance Acts and find:

Section 13 of the original Act, page 4, of this brief, provides:

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, * * * and shall decide all questions of fact arising under the Act, except as otherwise provided in Sections 5 and 405.

Section 2 of the amendment to the War Risk Insurance Act, page 7 of this brief, provides:

> That the director, subject to the general direction of the President * * * shall decide all questions arising under this Act except as otherwise provided herein.

Section 5 of the World War Veterans' Act, page 8 of this brief, provides:

> The director, subject to the general direction of the President, shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. * * *

Section 5, *supra,* was amended by Public No. 522, 71st Congress, 38 U.S.C.A. 426, by adding after the word "fact" the words "and law."

The exceptions in the Sections, *supra,* with reference to the decisions of the director, refer to the right to sue on claims arising under contracts of War Risk Insurance provided for by Section 5 of the War Risk Insurance Act of September 2, 1914, Section 13 of the Act of October 6, 1917, Section 405 of the amendment of August 9, 1921, to the War Risk Insurance Act, and Section 19 of the World War Veterans' Act. These Sections, however, provide that such suits shall be against the United States, and, hence, do not authorize a mandamus suit against the Administrator of Veterans' Affairs.

Pursuant to Section 5, *supra,* this appellee, as Administrator of Veterans' Affairs, on November 1, 1931, which, it will be noted, is prior to the finding that appellant Wilkinson had recovered his ability to follow continuously some substantially gainful occupation and is no longer permanently and totally disabled, promulgated Sections 3200 and 3201, Regulations and Procedure, page 9 of this brief, establishing the Insurance Claims Council and providing for the determination of whether an insured had recovered his ability to follow continuously a substantially gainful occupation.

We respectfully submit that by the foregoing we have shown ample authority for our contention that appellee has been authorized by the Congress to determine the fact whether the appellant Wilkinson, or any person insured under War Risk Insurance, has recovered his ability to follow some substantially gainful occupation and is not permanently and totally disabled.

Furthermore, as will appear from the regulations promulgated by the Bureau of War Risk Insurance while under the Treasury Department, and by the Veterans' Bureau and the Veterans' Administration, of which regulations this court will take judicial notice, and of which, of course, the Congress has been well aware, these agencies have continuously construed Bulletin No. 1, Treasury Decision No. 20, Section 404 of the War Risk In-

surance Act and Section 301 of the World War Veterans' Act as granting authority to them to determine that an insured had recovered his ability to follow continuously some substantially gainful occupation and was no longer permanently and totally disabled and this, irrespective of a judgment entered in accordance with a finding that an insured had become permanently and totally disabled.

Being aware of the construction placed on Section 404, Bulletin No. 1, and Treasury Decision No. 20, the Congress in reenacting the provisions of Section 404 of the War Risk Insurance Act into Section 301 of the World War Veterans' Act, in effect, adopted the construction placed on the other three and so gave legislative approval thereto.

See *United States* v. *Cerecedo Hermanos y Compania,* 209 U.S. 337; 52 L.Ed. 821, in which the court said, at page 339:

> * * * the reenactment by Congress, without change of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction. * * *.

In the case of *United States, et al.* v. *Lottie C. Conklin, Admrx.,* 27 Fed. (2d) 45, the Court said, at page 47:

> Furthermore, the construction placed on a doubtful portion of a statute by the Bureau charged with its execution is entitled to great weight and should not be lightly disregarded.

We have not discussed Section 17, Public No. 2, 73d Congress, referred to at length by appellants, for the reason that that part thereof, namely, "all laws granting or pertaining to yearly renewable term insurance are hereby repealed", was held by the Supreme Court to be unconstitutional as in contravention of the Fifth Amendment to the constitution in the cases of *Margaret Shea Lynch* v. *United States* and *Sam Wilner* v. *United States,* decided June 4, 1934, 78 L.Ed. 997. Therefore, this Section or its application to this case is immaterial.

However, we wish to emphasize that the appellee's action in finding that appellant Wilkinson had recovered his ability and was not permanently and totally disabled was not taken by reason of anything contained in Section 17, or the part thereof held to be unconstitutional. On the contrary, the appellee relied upon the authority contained in the Acts of Congress and regulations promulgated pursuant thereto, heretofore discussed in this brief, upon the theory that Section 17 did not affect them in respect of this matter.

II

The record herein fails to disclose that appellee's action was arbitrary or capricious or without evidence to support it

In their first point of argument appellants assert that the decision of the appellee, rendered April 30, 1933, that appellant Wilkinson has recovered his ability to follow continuously some substantially

gainful occupation and is no longer permanently and totally disabled, was wholly without evidence to support it and was, therefore, arbitrary and capricious. This argument is evidently based on that part of paragraph V of the appellants' petition (R. 8), alleging "and your petitioners are advised and believe and so aver that in terminating payments of permanent and total disability benefits under petitioner Wilkinson's contract of yearly renewable term insurance * * * respondent acted arbitrarily and capriciously and without evidence to support his decision, * * *." No facts are stated in the petition or in appellants' brief on which this allegation is based from which the truth thereof can be determined.

In the case of *Sam Silberschein* v. *United States,* 266 U.S. 221, the Supreme Court had before it a suit for compensation under the War Risk Insurance Act. The Court, speaking through Mr. Justice Sutherland, in part said, page 222:

> This writ of error brings here for determination the question whether the United States may be sued under Subd. 20, Sec. 24 of the Judicial Code upon a claim for compensation arising under Sec. 300 of the War Risk Insurance Act, as amended (June 25, 1918), Sec. 10, C. 104, 40 Stat. at L. 609–611, Compensation Stat., Sec. 514 qqq, and subsequent acts, and, if so, under what circumstances such suit may be maintained. * * *

The petition alleged that the decision of the Director was arbitrary, unjust, and unlawful, constituted a usurpation of power, was "contrary to the proofs, if any", and "contrary to the weight of evidence on file in petitioner's case." The action of the Director was alleged to be arbitrary; * * *.

The general allegations of the petition that the Director's decision was arbitrary, unjust, and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was misconstrued, or where the action of the executive officer was arbitrary or capricious. * * *

The statute which creates the asserted right commits to the Director of the Bureau the duty and authority of administering its provisions and deciding all questions arising under it; and in the light of the prior decisions of this Court, we must hold that his decision of such questions is final and conclusive, and not subject to judicial review; at least, unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious. * * *

Since it is not made to appear from the allegations of the petition that any of these exceptional conditions exist, the judgment of the District Court must be and it is affirmed.

In line with the rule announced in the *Silberschein case, supra,* appellee answering that part of petitioners' petition last above quoted (R. 14), averred that same constituted a conclusion of law and fact which appellee is advised he is not required to answer, but if so required, denies the same. The appellants by their demurrer to appellee's answer admitted want of any facts on which to base this allegation, so there is nothing before this Honorable Court from which it can determine that the action of appellee was arbitrary and capricious because wholly unsupported by any evidence.

The appellants alone chose as their remedy this petition for mandamus, and in making this choice assumed the burden of setting out in their petition, not conclusions of law, but facts showing what evidence could have been before the appellee when his decision was made. The necessity for justifying in detail the action of the appellee does not arise, we submit, until appellants' petition sets out a good and sufficient cause of action which, in the absence of an explanation by way of defense, would warrant the court in granting the writ. This the appellants have wholly failed to do in this case.

III

Appellee's action does not violate the due process clause

In their third point appellants argue that appellee has deprived them of property rights under

a valid existing contract of yearly renewable term insurance and a valid judgment of a court of the United States without due process of law in contravention of the Fifth Amendment to the Constitution.

It is assumed that the property rights of which appellants contend they have been deprived are the benefits provided by the contract; namely, monthly benefits because of permanent and total disability. However, these benefits did not exist, and hence constituted no property right, unless the appellant Wilkinson was permanently and totally disabled. We have shown, and it is conceded by appellants, that appellee found that Wilkinson had recovered his ability to follow some substantially gainful occupation, and is not permanently and totally disabled; hence, he is not entitled to any benefits under his contract, unless this Court should determine that the respondent's finding is wholly unsupported by evidence or contrary to law. We submit, as hereinbefore stated, that there is nothing before this Court from which it can determine whether the finding of recovered ability was wholly unsupported by the evidence, and we have also demonstrated that the law authorized appellee to make such finding. Therefore, appellant Wilkinson has no property right to any payments under his contract, his only property right being the right to convert his contract into some form of Government Life Insurance, as provided by Section 301 of the World

War Veterans Act, page 7 of this brief. This, Wilkinson is still privileged to do. Incidentally, it should be stated that Veterans' Regulation No. 8, promulgated by Executive Order of March 31, 1933, pursuant to Section 17 of Public No. 2, 73rd Congress, was cancelled by Executive Order of June 30, 1934.

Appellant Wilkinson took the contract herein, subject to any amendments to the organic Act authorizing the granting of War Risk Insurance, and any regulations promulgated pursuant thereto. *Emma White* v. *United States,* 270 U.S. 175. Therefore, appellants cannot be heard to complain of any change in the laws relating to this insurance, or any regulations promulgated pursuant thereto.

Insofar as the judgment is concerned, it has no future effect, for the reasons heretofore urged.

IV

Appellee's discretion cannot be controlled by mandamus

In the case of *Noble* v. *Union River Logging Railroad Company*, 147 U.S. 165, 37 L.Ed. 123, the court had before it a bill to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of plaintiff's maps for right-of-way of public lands, etc. The court granted the relief on the ground that since the patent had been issued according to law, the Secretary of the Interior could not lawfully revoke the action of his

predecessor in granting the patent. However, in its opinion the court through Mr. Justice Brown took occasion to say (p. 171):

> With regard to the judicial power in cases of this kind, it was held by this court as early as 1803, in the great case of *Marbury* v. *Madison,* 1 Cranch, 137 that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties an act or refusal to act is, or may become, the subject of review by the courts.

The ruling in *Marbury* v. *Madison,* as paraphrased by Mr. Justice Brown, has been so consistently followed that it would be a waste of time to cite the numerous cases so doing; and after a careful review of the many cases cited by appellants, we feel warranted in assuring this court that none, even by inference, undertake to deviate from that ruling.

The action taken by appellee in this case, assuming he was legally authorized to take it, involves the exercise of judgment or discretion, namely, that of determining whether appellant Wilkinson had recovered his ability to follow continuously any substantially gainful occupation and was not per-

manently and totally disabled. Therefore, such action cannot be controlled by mandamus.

In the case of the *United States ex rel. Finley* v. *Frank T. Hines,* Director United States Veterans' Bureau, 58 App.D.C. 120, this Court had before it a petition for writ of mandamus to compel the Director to pay installments alleged to be due on a War-Risk Certificate of insurance. A predecessor of defendant Hines had awarded benefits under the contract, which were paid until the death of the insured. Subsequent to the death of the insured defendant Hines refused to make further payment to the widow of the insured, and mandamus was sought. In denying relief this Court, after quoting from Section 2 of the Act of August 9, 1921, page 7 of this brief, and from the Act of August 9, 1921, 42 Stat. 154, said, at page 122:

> The statute which creates the asserted right commits to the Director of the Bureau the duty and authority of administering its provisions and deciding all questions arising under it; and in the light of the prior decisions of this court we must hold that his decision of such questions is final and conclusive and not subject to judicial review, at least unless the decision is wholly unsupported by the evidence or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious. * * *.

Furthermore, this Court in that case at least indicated that the relief sought should be denied on

the ground that plaintiff had an adequate remedy at law.

It is conceded, of course, that if appellee was not authorized by law to make the finding that he did in respect of Wilkinson, then, of course, it is his ministerial duty to continue payments under the term contract. However, having conclusively shown, we believe, that the judgment of the District Court did not preclude appellee from making the finding of recovered ability; that appellee was authorized by law to make, and that he did, in fact, make such finding, and that, in view of such finding appellants are not entitled, under the law, to further benefits under the contract; appellants having failed to show that the appellee's finding of recovered ability is wholly unsupported by the evidence, or that it is in any other wise arbitrary or capricious, it clearly follows that there is no ministerial duty, controllable by mandamus, on the part of appellee to pay appellant Wilkinson monthly benefits under the contract. Of course, it is needless to state that, if nothing is due appellant Wilkinson, then appellant Coleman can claim nothing.

V

Mandamus should not be granted since if appellants are aggrieved they have an adequate remedy at law

Section 19 of the World War Veterans' Act, as amended, July 3, 1930, 38 U.S.C.A. 445, provides:

> In the event of disagreement as to claim, including claim for refund of premiums,

> under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled "An Act to provide for the bringing of suits against the Government of the United States", approved March 3, 1887, and section 10 thereof so far as applicable. * * *
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director.

If appellants are aggrieved because of the acts of appellee, then, under the Section above quoted,

they have an adequate remedy at law and their cause of action, if any, is not barred because it accrued upon the finding of the appellee that appellant Wilkinson had recovered his ability, which finding was made on April 20, 1933.

For the foregoing reasons it is respectfully submitted that the judgment herein is correct and should be affirmed.

Respectfully submitted.

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